

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

**COMPLAINT OF THE CITY
AND COUNTY OF SAN FRANCISCO**

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Docket No. C2011-2

**CITY AND COUNTY OF SAN FRANCISCO'S SUBMISSION IN RESPONSE TO
THE COMMISSION'S NOVEMBER 8, 2011 ORDER ADDRESSING STATUS OF
COMPLAINT**

INTRODUCTION

As Complainant City and County of San Francisco ("San Francisco") noted in its Complaint to the Commission, the City has been pursuing litigation in the United States District Court for the Northern District of California alleging violations of the U.S. Constitution's guarantees of equal protection and free speech by the Postal Service based on its mail delivery policies for Single Room Occupancy ("SRO") buildings. The district court's recent decision in that case to grant summary judgment in favor of the Postal Service has no bearing on San Francisco's complaint before the Commission.

San Francisco alleged different claims before the district court. The district court ruled on purely constitutional claims. The district court did not have jurisdiction to hear a regulatory challenge like the one San Francisco is pursuing before the Commission. The Postal Reorganization Act ("PRA") vests the Commission with the jurisdiction to hear such challenges. San Francisco did not (and could not) pursue its regulatory challenge before the district court. The decision

in the district court relating to different claims is therefore not binding on the Commission; neither collateral estoppel or res judicata can attach to it.

Additionally, the Commission owes no deference to any comments in the district court's summary judgment decision relating to interpretation of Postal Service regulations. First, as noted above, the district court is not empowered to rule on whether or not the Postal Service has violated its regulations -- that is a job only for this Commission. Second, the district court made a clearly erroneous statement in its summary judgment decision concerning the meaning of Postal Office Manual section 631.451(b), which is contrary to the Postal Service's regulatory scheme and to the history of the regulation. San Francisco has asked the district court to amend its decision to correct this error. Whether or not the district court amends its judgment, however, the Commission is not required to give the district court's erroneous reading of the regulation any deference whatsoever.

San Francisco therefore asks the Commission to issue a notice of proceeding in this action.

ARGUMENT

I. The Commission Has Exclusive Jurisdiction to Hear San Francisco's Regulatory Challenges and the Claims Before the District Court Were Fundamentally Different From Claims Before the Commission.

San Francisco raises two sets of claims in its complaint. Count 1 asks the Commission to determine that the Postal Service must comply with POM § 631.45 by delivering mail to individual mailboxes in San Francisco buildings, including SROs, that meet the plain requirements of POM § 631.45. See Complaint at ¶¶ 57-66. Count 2 alleges unreasonable discrimination among users of the mails

in violation of 39 U.S.C. § 403(c), based on the Postal Service's dissimilar treatment of similar buildings as defined by POM § 631.45. See Complaint at ¶¶ 67-69. In essence, San Francisco's complaint before the Commission seeks to challenge the Postal Service's interpretation of its regulations, an issue that the district court could not decide. By statute, this Commission is the only appropriate venue for San Francisco to raise a challenge to the Postal Service's interpretation of Postal Service regulations. See *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004) (citing 39 U.S.C. § 101, *et seq.*). Under the PRA, the Commission is the only forum where San Francisco may pursue its challenge that the Postal Service has erroneously interpreted its regulations. See *id.* (citing 39 U.S.C. § 101, *et seq.*).

During all phases of this litigation, both parties acknowledged that the Northern District of California does not have jurisdiction to decide whether the Postal Service's conduct violates its own regulations. See, e.g., *Federal Defs.' Reply Br. in Supp. of Mot. to Dismiss Compl.*, No. 3:09-cv-01964-RS (EDL) (Aug. 18, 2009) (Dkt. No. 21), at 2:17-18 ("Under the PRA, Congress further removed the district courts' jurisdiction over claims regarding postal rates and services."); *Pls.' Opp'n to Def.'s Mot. to Dismiss*, No. 3:09-cv-01964-RS (EDL), (Aug. 11, 2009) (Dkt. No. 19), at 13-14 (representing that Plaintiffs did not bring a regulatory claim before the district court). Indeed, the Postal Service has repeatedly argued that San Francisco could not bring regulatory claims before the district court and must bring all claims before the Commission. *Federal Defs.' Reply Br. in Supp. of Mot. to Dismiss Compl.*, No. 3:09-cv-01964-RS (EDL) (Aug. 18, 2009) (Dkt. No. 21), at 7:13-14 (plaintiffs should seek "review of SRO delivery in San Francisco by the adjudicative body designated

by statute and regulation to do so,” the Postal Regulatory Commission). The Postal Service has also all but acknowledged that San Francisco’s claims before the Commission are different from those pending before in the district court litigation. Mot. to Stay at 11-12.

Moreover, the court orders in the district court litigation have recognized that only constitutional claims were at issue. See *Order Den. in Part and Granting in Part Defs.’ Mot. to Dismiss*, No. 3:09-cv-01964-RS (EDL) (Nov. 5, 2009) (Dkt. No. 28), at 4:22-23 (“But Plaintiffs allege that Defendants’ conduct violate provisions of the United States Constitution, not Section 403(c).”); *Order Granting the Def.’s Mot. for Summ. J.*, No. 3:09-cv-01964-RS (EDL) (Oct. 25, 2011) (Dkt. No. 351), at 1:22-24 (“[Plaintiffs] allege that defendant’s failure to provide centralized delivery violates the SRO tenants’ constitutional rights to: (1) equal protection; (2) free speech; (3) freedom of association; and (4) privacy.”).

There can be no doubt that the parties and the district court understood the claims at issue in the district court litigation to be constitutional in nature and distinct from the regulatory challenge before the Commission.

A. Complainant’s Regulatory Claims are Not Barred By Res Judicata

Res judicata, or claim preclusion, applies to bar relitigation of claims or defenses that were raised or could have been raised where: “(1) the same parties, or their privies, were involved in the prior litigation, (2) the prior litigation involved the same claim or cause of action as the later suit, and (3) the prior litigation was terminated by a final judgment on the merits.” *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 952 (9th Cir. 2002). Res judicata bars asserting a claim that was extinguished by a final judgment in the prior action, either as a cause of action or as

an affirmative defense. See *Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Sur. Co.*, 133 Cal. App. 4th 1319, 1327-30 (2005); *Torrey Pines Bank v. Super. Ct.*, 216 Cal. App. 3d 813, 817, 821-22 (1989). Here, the district court litigation did not involve “the same claim or cause of action” as the claims at issue in the complaint before the Commission. As discussed above, the district court and all parties to the litigation have acknowledged in the public record that the only issues involved in the district court litigation were constitutional claims directed at the Postal Service’s violation of SRO residents rights to equal protection, freedom of speech, freedom of association, and the right to privacy derived from the First and Fourth Amendments. The claims alleged in the complaint before the Commission challenge the Postal Service’s discriminatory interpretation of its regulations; the claims here do not turn on the outcome of the constitutional inquiry present in the district court litigation.¹ Res judicata does not apply and the district court’s opinion does not have preclusive effect on the Commission.

B. Collateral Estoppel Does Not Apply

In general, collateral estoppel “can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action.” *Wolfson v. Brammer*, 616 F.3d 1045, 1064 (9th Cir. 2010) (quoting *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71 (1984)). Pursuant to this doctrine “a party is precluded from relitigating an issue if four requirements are met:

¹ While the Complaint alleges unreasonable discrimination among users of the mails in violation of 39 U.S.C. § 403(c), the 403(c) claim is distinct and substantially different than the court’s analysis of constitutional discrimination challenge under the Equal Protection doctrine. Furthermore, the Commission’s analysis of the 403(c) claim turns on its interpretation of the Postal Service’s regulations, an analysis expressly reserved to the Commission under the PRA.

(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated; (3) there was final judgment on the merits; and (4) the person against whom collateral estoppel is asserted was a party to or in privity with a party in the previous action.” *Id.* (citations omitted). The party seeking to rely on issue preclusion bears the burden of establishing each of these elements. *Kendall v. Visa, Inc.*, 518 F.3d 1042, 1050-51 (9th Cir. 2008). Here, collateral estoppel will not apply because the regulatory issues before the Commission were not actually and necessarily litigated before the district court.

San Francisco acknowledges that the district court purported to evaluate whether the Postal Service was in violation of Postal Office Manual Section 631.451(b) as part of its analysis. But, no party to the district court litigation had a full and fair opportunity to litigate the question of whether the Postal Service was violating Section 631.451(b) of the Postal Office Manual.² The parties did not brief the question because the district court lacked jurisdiction to consider the issue. The Supreme Court “has repeatedly recognized . . . that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a ‘full and fair opportunity’ to litigate that issue in the earlier case.” *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (citations omitted) (emphasis added); accord *Maciel v. Comm’r Internal Rev.*, 489 F.3d 1018, 1023 (9th Cir. 2007).

² Plaintiffs never argued that the district court should grant relief on the basis of the Postal Service regulations or determine whether the Postal Service was in compliance with the regulations. Any references the Postal Service regulations was simply a point of reference for purposes of the court’s analysis that the buildings were similarly situated.

In order to determine whether an opportunity to litigate was “full and fair,” a court “must make a practical judgment based on at least two considerations. First, the court must compare the procedures in the prior and subsequent actions” to determine if procedural opportunities in the second action could lead to a different result. *Maciel*, 489 F.3d at 1023 (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 & n.15 (1979)). And second, “the court must consider the parties’ incentives to litigate in the two actions. If a party had good reason not to contest an issue vigorously during the first action and did not, in fact, vigorously contest the issue, that party generally should be entitled to relitigate the issue during the second action.” *Id.*; see also 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4434, at 612 (2d ed. 2002) (“The most general independent concern reflected in the limitation of issue preclusion by the full and fair opportunity requirement goes to the incentive to litigate vigorously in the first action.”). San Francisco has not had an opportunity to (and did not attempt to) litigate its regulatory claims against the Postal Service in the district court litigation. The district court acknowledged that it lacked the power to adjudicate such issues. The statement in the district court’s summary judgment decision purporting to evaluate the issue of regulatory compliance is not entitled to issue preclusive effect before the Commission. The Commission, and not the district court, is the authority for evaluating whether the Postal Service has complied with its regulations.

II. The District Court Did Not Have Jurisdiction to Decide Whether The Postal Service’s Policy of Delivering Mail to SRO Residences by Single Point Delivery Violated POM § 631.45 and Its Finding Was Erroneous.

While the district court purported to conclude that the Postal Service has not violated section 631.451(b) of the Postal Office Manual in the context of

evaluating Plaintiffs' constitutional claims on summary judgment, in the absence of briefing on the topic (since neither party had asked the district court to consider the issue given the mandate of the Postal Reorganization Act that regulatory challenges be filed with the Commission and not a district court) the district court reached a clearly erroneous conclusion. To correct this error, plaintiffs in the district court litigation have recently filed a motion to amend the court's order granting summary judgment seeking to have the finding relating to the Postal Service's violation of its regulations removed from the court's order. See Ex. 1 (Plaintiffs' Motion to Alter Judgment Granting Defendant's Motion for Summary Judgment).

First, the district court lacked jurisdiction to decide questions of regulatory compliance by the Postal Service. See *Currier v. Potter*, 379 F.3d 716, 725 (9th Cir. 2004) ("Given this statutory backdrop, we are satisfied that the PRA evinces Congress's general intent to withdraw judicial scrutiny of postal regulations.").

Second, as set out in briefing before the district court pursuant to Fed. R. Civ. P. 59 (attached hereto as Exhibit 1), the district court's analysis of the relevant sections of the Postal Operations Manual ("POM") is unsupported by the factual record, contradicted by the POM, and was never advanced by the Postal Service. The district court incorrectly interpreted POM section 631.451(b). The Complaint before the Commission alleges that the Postal Service's policies and practices relating to SROs in San Francisco are in violation of Section 631.45; that is the central issue to be decided by the Commission. The Commission owes no deference to the district court in evaluating this issue.

CONCLUSION

San Francisco's complaint before the Commission raises legitimate claims that the Postal Service is discriminating against some of San Francisco's most vulnerable residents due to its erroneous reading of its regulations. The City and County of San Francisco respectfully requests that the Postal Regulatory Commission issue a notice of proceeding in this action and allow San Francisco's regulatory challenge to move forward.

Dated: November 21, 2011

By: //s// Michael Markman

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